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THE HIGH COURT OF SIKKIM : GANGTOK

Writ Petition (C) No. 21 of 2006

Shri Balchand Sarda,
Senior Registered Class I A Contractor of
Sikkim Public Works Department,
M.G. Marg, Gangtok, Sikkim.

... Petitioner.

-Versus-

1. The State of Sikkim, represented by its Chief Secretary, Government of Sikkim, Gangtok, East Sikkim.

2. The Secretary, Rural Management & Development Department, Gangtok.

3. The Chief Engineer (I/C), Rural Management & Development Department, Government of Sikkim, Gangtok.

4. Union of India, represented by the Secretary, Ministry of Rural Development, New Delhi.

... Respondents.

Lawyers for the Petitioner :	Mr. M.Z. Ahmed, Senior Advocate and Mrs. B. Datta, Advocate.
Lawyers for the Respondents:	M/s S.P. Wangdi, Advocate General, J.B. Pradhan and Karma Thinlay, Government Advocates.

PRESENT: HON'BLE CHIEF JUSTICE MR. BINOD KUMAR ROY &
HON'BLE MR. JUSTICE A.P. SUBBA.

DATE OF HEARING & JUDGMENT: SEPTEMBER 21, 2006

JUDGMENT

B.K. Roy, CJ: The Petitioner has come up, in substance, for granting following reliefs: -

(i) To quash the NIT (Notice Inviting Tender) dated 18.4.2006 published in the Newspaper Sikkim Herald dated 25.4.2006 (as contained in Annexure 1).

(ii) To quash the List of Contractors dated 29.5.2006 (as contained in Annexure 10).

(iii) To stay operation of the impugned NIT as well as the list of contractors and/or the Respondent Authorities be directed not to award any work under the PMGSY (Pradhan Mantri Gram Sadak Yojana) works on the basis of the NIT in question.

[2] The Petitioner's case, in short, is as follows: -

(i) He is a Senior Registered Class I A Contractor of Sikkim Public Works Department (SPWD) who has undertaken several prestigious works within and outside the State of Sikkim, as enumerated in Paragraph 3, which were accepted by the authorities. Thereby he is entitled to be awarded works of Rs.1 crore and above.

(ii) Pursuant to the impugned NIT had deposited Rs.2,30,000/- for obtaining tender forms and Rs.45,75,145/- as earnest money at 2.5 % of the tender cost. The Petitioner had submitted tenders for 5 out of total 59 packages 1, 2, 12, 20 and 50 mentioned therein.

(iii) The impugned N.I.T. as contained in Annexure 1 was published without any authority of law. It contained glaring anomalies, which were pointed out to the concerned Officers of the Department. As per the Central Public Works Department (C.P.W.D.) Works Manual, tender forms are issued only after a Contractor pre-qualifies himself, whereas the system adopted in the instant case was not only highly illegal but also without any justification. As per Section 17.1.2 of the CPWD Works Manual a tender document should be sold only to those contractors who fulfill the eligibility criteria setout

in the Press Notice. The Respondents lack knowledge of the provisions of this Manual or have mischievously opted for the two bid tender system with oblique view to eliminate certain contractors and/or to favour a chosen few. The Respondents have also failed to follow the procedure prescribed under Sections 15.7 to 15.14 of the Manual and to specify the requirement with regard to the rate of Tenders in the impugned N.I.T.

[3] In their Counter Affidavit and Additional Affidavit Respondent Nos. 1 to 3 assert, inter alia, to this effect: -

(i) His claim that he had undertaken several works as disclosed in the list of such works, on close scrutiny it has come to light that he had executed work as sub-contractor of one Daluram Sarda. He has not substantiated his claim by any authentic document. His claim could not have been taken into consideration for evaluating technical qualification as defined in SBD.

(ii) Pursuant to the guidelines as contained in Standard Bid Documents (in short 'SBD') circulated by the NRRDA (National Rural Road Development Agency) as contained in Annexure R-1, circulated to the State Governments and the guidelines issued by the Ministry of

Rural Development, Government of India, New Delhi particularly provision of Chapter 11 of it [as contained in Annexure R 4(c)] the Standard Bid Documents was adopted for all PMGSY Works vide Notification as contained in Annexure R-3. Therefore, the entire foundation of the Petitioner is misconceived.

(iii) He does not have any locus to file this Writ Petition. He did not fulfill the eligibility criteria prescribed under Clause 4.5 of the Bid and, therefore, Clause 4.4A (c) of the SBD prescribes conditions to qualify for award of the contract enumerated in paragraph 18. The intending contractors/firms should have satisfactorily completed as prime contractor at least one similar work, equal in value to two third of the estimated cost work (excluding maintenance cost) for five years for which the bid was invited. The Petitioner did not fulfill any of the conditions of qualification aforementioned. Clause 4.5 stipulated that sub-contractor's experience shall not be taken into account. He had even failed to show that he was a sub-contractor duly employed by the principal contractor/employer/ employee, the certificate filed by him was issued by one Daluram Sarda. On enquiry, it has transpired that there

is no record available with the NBCC of taking prior consent to it for engagement of the Petitioner as sub-contractor, as it appears from the Annexure R-11. NIT was published with full authority of law without any anomaly.

(iv) The instant tender process was not arbitrary, discriminatory or activated by any malice. The Petitioner had purchased five tender documents in respect to package numbers 1, 2, 12, 20 and 50, out of which he quoted bid for only package numbers 1, 12, and 20; he has thus misled this Court.

(v) Prior to issuance of the tender documents prospective tenderers were issued challan with 3 page documents wherein important informations were supplied with regard to tender process and requirements (as contained in Annexure R-7 and R-8).

(vi) A Pre Bid Meeting of the contractors was held for clarifying any doubt of the intending bidders in accordance with the provisions of SBD in which the Petitioner participated. A copy of the minutes of the said Meeting is Annexure R-9. Queries raised by him in the Pre Bid Meeting were satisfied to the best of his satisfaction which have been once again raised in the

Writ Petition. The allegations made in regard to opting two bid tender system with a view to eliminate certain contractors or for choose a few are being denied.

(vii) After receipt of the tender documents the technical bid was opened by the Tender Evaluating Committee in presence of the bidders who were present. The Tender Evaluating Committee evaluated the technical bid after obtaining the approval of the Government. Since the Petitioner did not fulfill the criteria of qualification, he failed to qualify in the technical bid. The list of bidders, found to be qualified in that test, was displayed. Thereafter, financial bid was opened. The tender process was under PMSYG Scheme.

(viii)The allegations in relation to non-compliance of the C.P.W.D. Works Manual and S.P.W.D. Works Manual are totally misconceived, which are not applicable.

(ix) The Petitioner was aware of the fact that the tender process was to be conducted as per the SBD, which was also supplied to him, as well as to others, at the time of issuance of tender forms. The Writ Petition is, thus, liable to be dismissed on the ground of waiver and acquiescence.

(x) He has concealed the fact of taking part in the Pre Bid Meeting and of his prior knowledge of adoption of two bid systems prescribed under SBD. For concealment of these facts by him the Writ Petition is liable to be dismissed.

(xi) He has not been able to make out any case of violation of any legal right or fundamental right.

(xii) It has also been filed with a malafide intention to stop the developmental works undertaken by the Government.

[4] Respondent No. 4 (Secretary, Ministry of Rural Development, Government of India) has also filed Counter Affidavit and pointed out that works under PMGSY are to be tendered as per the SBD circulated to the State Government by MRRDA.

[5] The Petitioner has filed Rejoinders to the Counter Affidavit and the Additional Affidavit of Respondents No. 1 to 3 denying the submissions and averments made therein highlighting that the impugned NIT having been issued in violation of the SBD, it is liable to be set aside and quashed; issuance of Press Notice, as mentioned in the SBD (Annexure 13) was a pre-requisite which he has

been violated; and that correctness of the averments made in the Writ Petition are affirmed.

The submissions: -

[6] The learned Advocate General, appearing on behalf of the Respondents, raised the question of maintainability of this Writ Petition contending as follows: -

The instant Writ Petition is not a Public Interest Litigation. The Petitioner has to satisfy this Court about his eligibility. On his own case, set forth in his first Rejoinder, it is clear that he was not eligible in view of the fact that had he known the terms and conditions he would not have invested huge money for purchasing the tender forms and in depositing Earnest Money. The Petitioner did not fulfill the requisite qualification laid down in Clause 4.4A, according to which execution of similar works in one's own name during the last three years was a must. He has also not impleaded any of the 27 contractors, besides the successful bidders whose tenders were accepted by the Government.

[7] Mr. Ahmed, the learned Senior Counsel appearing on behalf of the Petitioner contended as follows: -

As contemplated in the SBD issuance of Press Notice as contemplated in Annexure-1 was mandatory, violation of which rendered entire procedure null and void. It was not done and consequently the impugned NIT and List of Contractors both be quashed. The Government of Sikkim through its Notification dated 22.7.2003 (Annexure R-3) has already adopted it.

The act of the authorities is arbitrary, discriminatory and in colourful exercise of powers. Many of the contractors enumerated in paragraph 17, shown in the list, who have been declared qualified, lacked requisite qualifications. Exclusion of the name of the Petitioner in the impugned list was without any valid basis which amounts to denying his rights under Articles 14, 19 and 21 of the Constitution of India.

The Petitioner having been allowed to invest huge money in purchasing the tender forms and depositing earnest money could not have been thrown out on account of applicability of principle of waiver and acquiescence of the authority.

An opportunity be granted to the Petitioner to implead the contractors including the successful bidders even at this stage.

[8] The learned Advocate General, in reply, apart from reiterating his objection also submitted as follows: -

Publication of Press Notice was not required, as it was not mandatory.

The Petitioner was aware of the terms and conditions spelled out in the N.I.T. and accordingly he has waived his claim, he has acquiesced in the matter. He has made similar claims, in the pre-bid meeting, which was held as contemplated in the N.I.T.

The works under the Scheme, except one or two, have progressed. Permitting the Petitioner to implead the contractors and successful bidders at this stage will merely delay the matter.

Therefore, the Writ Petition be thrown out as not maintainable.

[9] Following questions emerge for adjudication: -

(i) Whether non-issuance of public notice had vitiated the NIT and the entire bid process?

(ii) Whether the Petitioner was eligible and can successfully challenge the NIT?

(iii) Whether by purchase of tender forms and deposit of earnest money he was entitled to have the bid?

(iv) Whether the Petitioner should be allowed at this stage to implead the contractors mentioned in the impugned list and the successful bidders?

[10] We were taken through the Standard Bid Document by both learned Counsel. It does not even refers to issuance of a Press Notice. The guidelines do not contemplate any consequence of failure to publish public notice. What provisions are directory and mandatory stands well settled by a catena of decisions of the Apex Court. We find force in the submissions of the learned Advocate General that the objections raised by the Petitioner were also raised by him in the pre-meeting stage, which is evident from the minutes of the Pre-bid Meeting (as contained in Annexure R-9). This fact was also not denied by him in his rejoinders or by Mr. Ahmed before us. Thus, issuance of Press Notice was not mandatory, which had vitiated the NIT and the entire bid proceeding.

[11] We accept the submissions made by the learned Advocate General that the Petitioner was not eligible as he did not fulfill the terms and conditions laid down in clause 4.4A, according to which execution of similar works by the Petitioner during last 3 years was a necessary requisite. Mr. Ahmed could not satisfy us that the Petitioner possessed such requisites. We also find force in the submission of the learned Advocate General that his alleged experience as sub contractor had no bearing on the condition laid down in the aforementioned sub clause.

[12] It appears that the Petitioner, who had also taken part in the Pre-bid Meeting was aware that of the terms and conditions of the bid. His purchase of tender forms and deposit of earnest money which is refundable, is of no consequence. He had acquiesced in the bid. His claim is also hit by waiver.

[13] Allowing him to implead the contractors and the successful bidders at this stage will only delay the matter. We are thus, not inclined to exercise our discretion.

[14] Even though the Petitioner has not prayed for refund of his Earnest Money, as stated by the learned Advocate General that it will be refunded to the Petitioner, we expect that the Government will refund it to him preferably within one month from today.

[15] Accordingly we dismiss this Writ Petition, but without cost.

[16] Let a copy of this order be handed over to the learned Government Advocate.

(Binod Kumar Roy)
Chief Justice

(A.P. Subba)
Judge